

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Section 272(f)(1) Sunset of the BOC)	
Separate Affiliate and Related)	WC Docket No. 02-112
Requirements)	
_____)	

**COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

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The United States Telecom Association (USTA),¹ through the undersigned and pursuant to Federal Communications Commission (FCC or Commission) Rules 1.415 and 1.419,² hereby submits its comments in response to the FCC's *BOC Separate Affiliate Notice*³ in the above-docketed proceeding. With the impending end of the three-year time frame for which Verizon and SBC first obtained Section 271 authority, the Commission has appropriately recognized the need to prepare for the sunset of Bell Operating Companies' (BOCs') separate affiliate obligations pursuant to Section 272(f)(1) of the Telecommunications Act of 1996 (1996 Act).⁴ Likewise, the three-year time clock is ticking for BellSouth, which obtained Section 271 authority in May 2002.⁵ Section 272(f)(1) demands that at the end of this three-year time frame

¹ USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² 47 C.F.R. §§ 1.415 and 1.419.

³ *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, FCC 02-148, Notice of Proposed Rulemaking (rel. May 24, 2002) (*BOC Separate Affiliate Notice*).

⁴ Verizon's Section 272 obligations are scheduled to sunset in December 2002 because Verizon obtained Section 271 approval in New York in December 1999 and SBC's Section 272 obligations are scheduled to sunset in June 2003 because SBC obtained Section 271 approval in Texas in June 2000. *See BOC Separate Affiliate Notice* at ¶7.

⁵ BellSouth's Section 272 obligations are scheduled to sunset in May 2005. *See BOC Separate Affiliate Notice* at fn. 19.

the BOCs' separate affiliate obligations will sunset, unless the Commission extends those obligations.

SUMMARY

Section 272 of the 1996 Act imposes structural separation requirements on BOCs by requiring them to use separate affiliates for manufacturing activities, origination of interLATA telecommunications services, and interLATA information services.⁶ As a general matter, USTA believes that the current state of competition does not necessitate these and other structural separations imposed on incumbent local exchange carriers (ILECs).⁷ Equally important, structural separations cause ILECs to incur unnecessary costs through inefficient use of resources. However, USTA recognizes that, at this time, separate affiliate requirements are imposed on BOCs by statute and that this proceeding addresses the sunset of those requirements.

In this proceeding, the Commission specifically seeks comment on whether and how to allow BOCs' Section 272 separate affiliate obligations for interLATA telecommunications services to sunset automatically three years after the grant of Section 271 authority, to extend such Section 272 obligations, or to impose alternative safeguards in place of such Section 272 obligations.⁸ An underlying premise upon which the Commission bases these questions is that Section 271 authority is provided to a BOC on a state-by-state basis and therefore the sunset dates for each BOC will vary depending on when a BOC obtains Section 271 authority in each

⁶ See 47 U.S.C. §272(a)(2).

⁷ USTA has previously advocated for the elimination of separate subsidiary requirements for independent ILECs. See USTA Comments, *2000 Biennial Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175 (Nov. 1, 2001) and USTA Reply Comments, *2000 Biennial Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175 (Nov. 20, 2001). Notably, the Commission initiated its Notice of Proposed Rulemaking regarding separate affiliate requirements for independent ILECs on September 13, 2001. Comments and reply comments were filed in November 2001. Yet, the Commission has issued no order in this proceeding, almost one year after it initiated the proceeding. USTA encourages the Commission to move forward promptly in this proceeding.

⁸ *BOC Separate Affiliate Notice* at ¶¶1, 10, 11, and 17. This proceeding does not address the sunset of the Section 272(f)(2) separate affiliate requirements for the provision of interLATA information services. These requirements have already sunset.

state.⁹ In other words, the Commission assumes that the BOC separate affiliate sunset provision – Section 272(f)(1) – applies on a state-by-state basis. USTA maintains that this is an inaccurate interpretation. Congress provided for the sunset of the Section 272 separate affiliate requirements on a regional basis for all states where the BOC provides services, triggered by the date on which a BOC obtains Section 271 for the first state in that region. At a minimum, Congress provided that sunset of these requirements would occur on a BOC-by-BOC basis for all states covered by the BOC’s territory, according to the definition of BOC¹⁰ in the Communications Act of 1934, as amended (Act), triggered by the date on which a BOC obtains Section 271 authority for the first state in that BOC territory, if there is more than one state in that territory. What is clear from plain language of Section 272(f)(1) and the legislative history of that section is that the sunset of the BOCs’ separate affiliate requirements should not occur on a state-by-state basis.

The Commission must allow a BOC’s separate affiliate obligations to terminate automatically – whether on a regional basis or on a BOC-by-BOC basis – three years after the BOC first obtains Section 271 authority in a state, unless the Commission extends those obligations. The Commission may extend those obligations, but Section 272(f)(1) does not explicitly provide that the Commission can replace the separate affiliate obligations with other structural or non-structural separations.¹¹ USTA maintains there is no reason to extend these BOCs’ separate affiliate obligations past the three-year time frame set forth in Section 272(f)(1) and that the deregulatory goals of the 1996 Act dictate that three years after each BOC has obtained its first Section 271 authority that it should be allowed to operate in the same manner –

⁹ Id. at ¶¶7 and 10.

¹⁰ See 47 U.S.C. 153(4).

¹¹ In fact, existing non-structural separations such as accounting and nondiscriminatory safeguards are more than sufficient to address concerns such as misallocation of costs and discrimination.

without structural separations – that its competitors operate. Further, the Act provides BOCs’ competitors and the Commission with the necessary tools to bring and enforce claims regarding BOCs’ alleged violations of their continuing obligations under the Act and the Commission’s rules and orders.

In these comments, USTA also proposes that the Commission should eliminate its rules prohibiting shared operation, installation, and maintenance by BOCs and their affiliates because they are not required by the Act and they competitively disadvantage BOCs.

DISCUSSION

I. Statutory Construction and the Plain Language of Section 272(f)(1) Provides for the Sunset of a BOC’s Section 272 Obligations on a Regional or BOC-by-BOC Basis Three Years After the Date that the BOC First Obtains Section 271 Authority in Any State.

Section 272(f)(1) of the 1996 Act provides that the separate affiliate obligations of Section 272, with the exception of Sections 272(e)(1) and (3), will sunset three years after a BOC is authorized to provide interLATA telecommunications services under Section 271, unless the Commission extends that three-year period. USTA maintains that, as written, the language of Section 272(f)(1) supports the sunset of a BOC’s separate affiliate requirements for the whole region in which it provides service three years after the date that it obtains Section 271 authority in its first state.

Section 272(f)(1) does not contain qualifying language that specifies this sunset provision applies on a per state basis as a BOC obtains Section 271 authority in each state where it operates. Without such qualifying language in Section 272(f)(1), there is no basis to continue to apply a BOC’s separate affiliate requirements in all states after it has met the sunset requirements in one state. Congress could have provided qualifying language, clearly limiting the application of Section 272(f)(1) to each state where a BOC had obtained authority to provide interLATA

telecommunications services. In fact, during the legislative process Congress considered language in H.R. 1555, the Communications Act of 1995, which clearly provided that sunset of separate subsidiary requirements would occur on a state-by-state basis 18 months after a BOC was authorized to provide interLATA telecommunications services.¹² Yet, in the Conference Report on S. 652, Telecommunications Act of 1996, the Congressional conferees did not adopt the amended separate subsidiary sunset language of H.R. 1555, but rather adopted language that simply stated the separate affiliate requirements would sunset three years after the BOC was authorized to provide interLATA telecommunications services.¹³ As a result, Section 272(f)(1) of the 1996 Act contains no language that limits the BOCs' sunset of separate affiliate requirements to a state-by-state basis. By not including language similar to that which was included in the amended H.R. 1555, Congress clearly considered and rejected language that would have required BOCs' separate affiliate requirements to sunset on a state-by-state basis according to when a BOC obtained Section 271(d) authority in a state.

Further, a review of the 1996 Act reveals that where Congress wanted to include language that limited the application of a provision of the 1996 Act, it clearly knew how to do so. In fact, in numerous provisions in Section 271 – namely Sections 271(b)(1), 271(c)(1), 271(c)(2), and 271(d)(1) – Congress crafted language that clearly specified a BOC's authority to provide interLATA telecommunications services would be granted on a state-by-state basis after

¹² As reported in the U.S. House of Representatives, the sunset language in Section 246(k) of H.R. 1555, pertaining to BOC separate affiliates, stated that the competitive safeguards requirements would “cease to apply in any local exchange market 3 years after the date of enactment of this part.” H.R. 1555, Communications Act of 1995, 104th Cong. (1995). *See also* 141 Cong. Rec. H8429. This language was later amended on the floor by the manager's amendment, and passed on a vote, so that Section 246(k) read that the separate subsidiary requirements would “cease to apply to any Bell operating company in any State 18 months after the date such Bell operating company is authorized . . . to provide interLATA telecommunications services in such State.” 141 Cong. Rec. H8445 (1995). *See also* 141 Cong. Rec. H8459 (1995).

¹³ *See* 142 Cong. Rec. H1118 (1996) (H.R. Conf. Rep. No. 104-458 (1996)).

applying for such authority in each state.¹⁴ Yet, no such limitation exists in Section 272(f)(1). Again, Section 272(f)(1) simply states that a BOC's separate affiliate obligations sunset three years after the date that the BOC obtains authority to provide interLATA telecommunications services under Section 271. Without more, a logical reading of Section 272(f)(1), particularly considering the legislative history of the 1996 Act, is that a BOC's separate affiliate obligations terminate for the whole region in which it provides services, three years after the date for the first state in which that BOC obtains Section 271 authority.

There should be no disagreement that a BOC's separate affiliate obligations sunset for the BOC's operating territory three years after the date on which each BOC – as BOC is defined in the Act¹⁵ – obtains Section 271 authority in any state in that territory. In other words, if a BOC's territory covers more than one state, the separate affiliate requirements for a BOC in that whole BOC territory would sunset three years after the date when the BOC obtains Section 271 authority for one state in its BOC region. A literal reading of Section 272(f)(1) supports the sunset of the BOCs' separate affiliate requirements on a BOC-by-BOC basis for the whole BOC region three years after a BOC has obtained Section 271 authority in one state within that BOC's territory.

The Commission should not apply Section 272(f)(1) on a state by state basis. Neither the legislative history of the section nor the plain meaning of the section support such an application. Importantly, the Commission should recognize that the effective result of a state-by-state application of the sunset provision is that, for the most part, a BOC receives no practical relief from those requirements until the BOC has obtained Section 271 authority for each state in its region.

¹⁴ 47 U.S.C. §271(b)(1), §271(c)(1), §271(c)(2), and §271(d)(1).

¹⁵ See 47 U.S.C. §153(4).

II. The Commission Should Not Extend Section 272 Obligations or Impose Alternative Structural Separation Requirements.

BOCs' competitors are not disadvantaged by the sunset of the separate affiliate requirements, however, BOCs are most certainly disadvantaged by the continued imposition of structural separations because they cannot operate at parity with their competitors who can provide, maintain, and bill local, long distance, and other services under one company. Any extension of the requirements that a BOC maintain a separate affiliate to conduct its interLATA telecommunications services past the three years after it obtains Section 271 authority in its first state would cause the BOC to unnecessarily incur additional costs in order to deploy redundant facilities and equipment. Such unnecessary, additional costs discourage new investment in facilities, equipment, and facilities deployment. Further, when BOCs must provide certain services through separate affiliates, they cannot effectively compete with their competitors who can utilize facilities and equipment efficiently and who can bundle packages of diverse products and services. Most importantly, consumers suffer when structural separations are imposed because they cannot obtain competitive packages of bundled services from BOCs, similar to those offered by the BOCs' competitors. Consumers are less willing to purchase local services from a BOC and long distance services from a BOC affiliate when they can purchase both of these services from one provider, the BOC's competitor. For these reasons, the Commission should not extend the BOCs' Section 272 obligations past the three years specified in Section 272(f)(1) nor should the Commission impose alternative structural separations that would replace and extend the Section 272 separate affiliate obligations.

III. The Act Provides Adequate Tools To Enforce BOCs' Obligations To Comply with Ongoing Requirements of the Act and the Commission's Rules and Orders.

The sunset of BOCs' separate affiliate requirements does not alter BOCs' existing, ongoing obligations to other telecommunications carriers, which are required by statute and Commission orders and rules. For example, after sunset of a BOC's separate affiliate requirements, a BOC's obligation to interconnect pursuant to the requirements of Section 251 continues. Likewise, a BOC's obligation to refrain from discrimination and cross-subsidization pursuant to Sections 272(e)(1) and 272(e)(3) also continues.¹⁶ In addition, the sunset of the BOCs' separate affiliate requirements does not prohibit the BOCs' competitors from using the numerous tools provided by the Act and the Commission's rules to enforce such continuing obligations. Competitors can bring claims for BOCs' alleged violations of their continuing obligations and the Commission can enforce these obligations under the authority of Sections 4(i), 201, 202, 206-209, 271(d), and 503 of the Act.

IV. The Commission Should Eliminate Immediately Its Rules Prohibiting Shared Operation, Installation, and Maintenance by BOCs and Their Affiliates.

Regardless of any action the Commission takes on the sunset provision of the BOCs' separate affiliate requirements, the Commission should, at a minimum, eliminate immediately its rules prohibiting shared operation, installation, and maintenance by BOCs and their long distance affiliates.¹⁷ Although these rules are associated with the "operate independently" requirement of Section 272(b)(1), the 1996 Act does not compel the requirements that the Commission imposes through these rules. Notably, the Commission recognized in its First Report and Order and Further Notice of Proposed Rulemaking in its proceeding on *Non-Accounting Safeguards of Sections 271 and 272* that the "Act does not elaborate on the meaning of the phrase 'operate

¹⁶ Sections 272(e)(1) and 272(e)(3) are specifically excepted from the sunset provision of Section 272(f)(1).

¹⁷ See 47 C.F.R. §§53.203(a)(2) and (3).

independently.”¹⁸ The Commission then interpreted the “operate independently” phrase as prohibiting shared operation, installation, and maintenance “in order to protect the potential for a BOC to discriminate in favor of a section 272 affiliate in a manner that results in the affiliate’s competitors’ operating less efficiently.”¹⁹ Yet, the necessary protections already existed in Sections 272(b)(2)-(5).²⁰

More importantly, the Commission’s rules prohibiting shared operation, installation, and maintenance are a formidable impediment to competition. They effectively prohibit BOCs from competing with other carriers for large business customers because, under these rules, BOCs cannot obtain, serve, and maintain customer accounts in the same manner (*i.e.*, through shared resources) that their competitors do. For these reasons, the Commission should eliminate its rules §§53.203(a)(2) and (3). Because these rules resulted from the Commission’s interpretation of the “operate independently” requirement of Section 272(b)(1), the relief from these rule requirements can, and should, be immediate – not tied to the three-year sunset requirements. Further, relief from these rules should encompass voice and data services for mass market and business customers.

CONCLUSION

The Commission should allow a BOC’s Section 272 separate affiliate obligations to terminate automatically – either on a regional basis or a BOC-by-BOC basis – three years after the BOC first obtains Section 271 authority in a state in order to allow BOCs to use their

¹⁸ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21978 (1996) (*Non-Accounting Safeguards of Sections 271 and 272*).

¹⁹ *Non-Accounting Safeguards of Sections 271 and 272* at 21981.

²⁰ See 47 U.S.C. §§272(b)(2)-(5). Notably, in the Conference Report on S. 652, Telecommunications Act of 1996, the comment on the language proposed in the amended H.R. 1555 regarding the “operate independently” provision simply stated that it mandated “fully separate operations and property, including books, records, and accounts between the BOC and its subsidiary.” H.R. Conf. Rep. No. 104-458 (1996). The requirements implemented by the Commission in its rules were not contemplated.

resources efficiently and to compete with their competitors effectively. For the same reasons, the Commission should not extend the separate affiliate requirements and not establish alternative structural separations, but should eliminate its rules prohibiting shared operation, installation, and maintenance by BOCs and their affiliates.

Respectfully submitted,

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